

Law Office of Shmuel Klein, PC
113 Cedarhill Ave.
Mahwah, NJ 07430
(201) 529-3411

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW JERSEY**

Hearing Date: February 4, 2010
Return Time: 11:00 am

In Re: X

Chapter 13

Angelica Santana
_____ X

Index No. 09-27767

NOTICE OF MOTION FOR EXPUNGE TO CLAIM

TO ALL PARTIES:

PLEASE TAKE NOTICE that, a motion will be made as set forth below:

JUDGE: Hon. Morris Stern
RETURN DATE AND TIME: February 4, 2010 11:00 am

PLACE: U.S. Bankruptcy Court
50 Walnut St.
Newark, NJ 07102

RELIEF REQUESTED: Motion to expunge claim of National
City Mortgage

BASIS FOR RELIEF REQUESTED: Rule 3007

DATED: January 4, 2010
Mahwah, NJ

/s/ Shmuel Klein
Shmuel Klein (SK 7212)
Law Office of Shmuel Klein, PC
Attorney for Debtor

Law Office of Shmuel Klein, PC
113 Cedarhill Ave.
Mahwah, NJ 07430
(201) 529-3411

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW JERSEY**

Return Date: February 4, 2010
Return Time: 11:00 a.m.

In Re: _____ x
Angelica Santana

Chapter 13
Index No. 09-27767

_____ x

**AFFIRMATION IN SUPPORT OF MOTION
OBJECTING TO CLAIM OF NATIONAL CITY MORTGAGE**

I, Shmuel Klein state that I have knowledge of the following and believe it to be true. I am counsel to the Debtor.

1. This affirmation is in support of the motion to expunge the claim of National City Mortgage annexed hereto as Exhibit "A".
2. EMC MORTGAGE CORPORATION submitted a claim No. 2 in the secured amount of \$287228.14 on 07/21/2009.
3. The claim must be expunged because an adversary was filed against National City Mortgage which was served on or about November 6, 2009 and National City Mortgage failed to answer the complaint. Annexed hereto is a true copy of the summons and complaint, Exhibit "B".
4. On December 28, 2009 the Court entered a default judgment against National City Mortgage, in the amount of the mortgage.
5. Debtor is entitled to offset her judgment against the claim and have it expunged.

WHEREFORE Debtor respectfully request that the motion be expunged.

Dated: January 4, 2010
Mahwah, NJ 07430

/s/ Shmuel Klein
Shmuel Klein (SK 7212) Fed Court Only
Law Office of Shmuel Klein, PC
Attorney for Plaintiff

Law Office of Shmuel Klein, PC
113 Cedarhill Ave.
Mahwah, NJ 07430
(201) 529-3411

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY**

Return Date: February 4, 2010
Return Time: 11:00 am

In Re: _____ x
Angelica Santana

_____ x

Chapter 13
Index No. 09-27765

**MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION
OBJECTING TO NATIONAL CITY MORTGAGE**

COMES NOW, Angelica Santana, the Debtor in the above captioned Bankruptcy case, and files this Memorandum of Law in support of this Motion, and as cause therefore would respectfully show this court as follows:

OPERATIVE FACTS

The Debtor incorporates by reference verbatim the statements of fact alleged in the affirmation in support of this Motion filed herewith.

ARGUMENTS AND POINTS AND AUTHORITIES

"The right of setoff allows parties that owe mutual debts to each other to assert the amounts owed, subtract one from the other, and pay only the balance." Darr v. Muratore, 8 F.3d 854, 860 (1st Cir. 1993). Implicit in setoff is that the debts being offset are debts running between the same parties and it is not appropriately applied when, as here, a party attempts to reduce its debt by receiving credit for the debt owed by some other individual to the plaintiff.

"Mutuality requires that the debts `be in the same right and between the same parties, standing in the same capacity.'" Darr, 8 F.3d at 860, (quoting 4 Collier on Bankruptcy ¶ 553.94 (15thed. 1992)). To be mutual, debts do not have to arise from the same transaction, but they must involve the same two parties. So-called "triangular setoffs" involving related entities, such as corporate subsidiaries or affiliates, do not pass the mutuality test. See Depositors Trust Co. v. Frati Enters., 590 F.2d 377, 379 (1st Cir. 1979)

VIOLATIONS OF RESPA

1. The "qualified written requests" was not acknowledged within 20 days of receipt as required by Section 2605(e)(1)(A) of Title 12 of the United States Code and Section 3500.21(e)(1) of Reg. X.

2. The Defendant did not, within 60 days of receipt of the "qualified written requests," provide the information requested and inform the Plaintiff of its actions as required by Section 2605(e)(1)(B)(2) Title 12 of the United States Code and Section 3500.21(e)(3) of Reg. X.

3. The Defendant has failed to comply with Section 2605 of Title 12 of the United States Code and failed to credit Plaintiff for payments made on the mortgage.

4. Pursuant to Section 2605(f) of Title 12 of the United States Code and Section 3500.21(f) of Reg. X, the Plaintiff may recover of the Defendant actual damages, costs and reasonable attorney fees for each failure of the Defendant to comply with any part of Section 2605 of Title 12 of the United States Code.

Law Office of Shmuel Klein, PC
113 Cedarhill Ave.
Mahwah, NJ 07430
(201) 529-3411

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY**

Return Date: February 4, 2010
Return Time: 11:00 am

In Re: _____ x
Angelica Santana

_____ x

Chapter 13
Index No. 09-27765

CERTIFICATE OF SERVICE

STATE OF NEW JERSEY)
COUNTY OF BERGEN)

I, Shmuel Klein, Esq., an attorney admitted to practice before this Court affirms under the penalties of perjury that I am not a party to this action and that I am over the age of 18 years old. I am associated with the Law Office of Shmuel Klein located at 113 Cedarhill Ave. Mahwah, NJ 07430 and I served the within Notice of Motion, Affirmation and Memorandum of Law on January 4, 2009, by depositing a true copy thereof in a post-paid wrapper, placing it in an official depository under the exclusive care and custody of the United States Postal Service within the State of New Jersey first class mail, addressed to the following persons:

National City Mortgage
3232 Newmark Drive
Miamisburg, OH 45342-5421

Marie-Ann Greenberg
Chapter 13 Standing Trustee
30 Two Bridges Rd
Suite 330
Fairfield, NJ 07004

/s/ Shmuel Klein
Shmuel Klein, Esq